Office Supreme Court U.S.
FILED
DEC 8 1900
JAMES H. McKENNEY
Clerk

No. 162.

Brf. of Heyburn & Doherty for Appellant.

17,578

IN THE

# SUPREME COURT

Filed Dec. 8, 1900.

OF THE

# UNITED STATES.

OCTOBER TERM, 1900.

No. 162.

MOUNTAIN VIEW MINING AND MILLING COMPANY,

Appellant,

vs.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. HARRIS,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

## Brief of Appellant.

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### STATEMENT OF CASE.

This case was tried in the Court below as an action at law. The Circuit Court of Appeals for the Ninth Circuit have held that all suits brought under the provisions of Section 2326 are suits in Equity, without regard to the position of the parties as to possession or otherwise. We have therefore come into this Court by appeal instead of by writ of error.

It is an action brought in support of an adverse claim

filed against an application for patent under the provisions of Section 2326 of the Revised Statutes of the United States.

The case was tried in the Circuit Court upon an agreed statement of facts, found in the Transcript at pages 35 to 39. This agreed statement of facts concedes the validity and regularity of appellant's location, provided that the North half of what was formerly the Colville Indian Reservation had been opened to the location of mining claims by the Act of Congress of July 1st, 1892, entitled "An Act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes."

27 U. S. Statutes, page 62.

The 11th paragraph of the stipulated facts (Trans. page 39, folio 78) states: "This stipulation is intended to admit "the validity of the location of the said Mountain View claim "in all respects, if at the time the same was located the lands "embraced therein were subject to location as a mineral claim; "and it is also intended to admit the validity of the locations of "the plaintiff's mineral claims, the Columbia or Gray Eagle "and Kruger or Exchequer, in all respects, if the Court deter- "mines that at the date of the location thereof the lands on "which the same are situated were vacant and subject to loca- "tion as mineral claims, defendant's pretended mineral claim "being prior in point of time."

The appellant's location of the Mountain View lode claim was made on the 16th day of October, 1895. (Trans. p. 36. folio 71.) The appellees' claims were located on February 20th, 1896.

This latter date was the date of the passage of the Act of Congress, approved February 20th, 1896, entitled, "An act to extend the mineral land laws of the United States to the lands embraced in the North half of the Colville Indian Reservation."

29 U. S. Statutes, page 9.

By the stipulation of facts it is agreed that the only question involved, to be considered by the Court is as to whether or not the land upon which these locations were made, being originally included within the North half of the Colville Indian Reservation, was thrown open to the location of mining claims by the Act of July 1st, 1892.

27 U. S. Statutes, page 62.

The action was originally commenced in the State Court, and removed to the United States Court on the ground that a Federal question was involved. The petition for removal in this case specifically sets up the controversy as to whether or not the reservation had been opened so as to permit the location of mining claims. (Trans. pp. 7 to 11.)

It is claimed that the Courts will take notice of the geography of the country and of the fact that the Mountain View lode claim was located upon what had been or was an Indian reservation and will further take notice of the Act of Congress declaring the North half of the Reservation upon which this claim was located to have been restored to the Public Domain, and that the Court will assume jurisdiction of this case, because of its knowledge of that fact, whether the same be stated

in the bill or not. If the Court will not take notice of the fact that this controversy arises over land situated within the North half of the Colville Reservation, and that the determination of this question rests upon an interpretation of the Act of Congress of July 1st, 1892, and will not take notice of any facts set up in the petition for removal, then this case would come within the ruling of this Court in the case of Shoshone Mining Co. vs. Rutter and Bradley, in the 177 U. S., 505.

The Circuit Court, at the trial, held that the Act of July 1st, 1892, restored the land in controversy to the public domain, and that it was therefore subject to the location of mining claims. The Circuit Court of Appeals reversed this decision, holding that the land was not subject to location as a mining claim until the passage of the Act of February 20th, 1896. The appellant has specified as error the following:

I

That it appears upon the face of the bill, that the plaintiffs have an adequate remedy at law.

II

That the said plaintiffs have not in and by said bill made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for from or against the defendant.

III

Because it doth not appear that the action is one arising under the constitution and laws of the United States.

V

The decision of the United States Circuit Court of Appeals for the ninth circuit wherein it holds that the land and premises located and claimed as the Mountain View mining claim was not open to location as a mining claim prior to the 20th day of February, A. D. 1896, and at the time of the location of the said Mountain View mining claim.

VI

The judgment of the said Circuit Court of Appeals that the location of the Mountain View mining claim was invalid by reason of the fact that the land and premises were within an Indian Reservation and not subject to location at the time the same was made by the defendant.

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## ARGUMENT.

The first assignment of error is directed to the question as to whether in this action the plaintiff below had an adequate remedy at law. The Circuit Court so held. The Circuit Court of Appeals treated it as a suit in equity, and we have therefore been compelled to treat it as such upon this appeal.

The agreed statement of facts renders it unnecessary to specifically consider the second assignment of error.

If the Court shall hold that notice will be taken of the fact that this controversy arises over lands lying within what had been an Indian Reservation, and that the controversy being as to whether or not by virtue of the Act of Congress this reser-

vation was restored to the public domain so that it became open to the location of mining claims, then the third assignment of error would be disposed of, but if the Court holds that it will not take notice of that fact, which is specifically set up in the agreed statement of facts as well as in the petition for removal while not specifically stated in the complaint filed in the State Court, or that such fact may be gathered from the original complaint taken in connection with the Court's knowledge of the geography of the country, then the case was erroneously removed and the United States Court would not have jurisdiction of the case.

At the time when these proceedings were had in the Circuit Court, it had been established by the decision of the Circuit Court of Appeals for the ninth circuit, that these cases were removable because of the fact that they were brought pursuant to the provisions of Section 2326 of the Revised Statutes of the United States, but this doctrine has been overthrown by the recent decision of this Court in the case of

Blackburn vs. Portland Min. Co., 175 U. S., 581.

Shoshone Min. Co. vs. Rutter, et al., 177 U. S., 505.

The 5th and 6th assignments of error go to the real question involved in the controversy and we will consider them together.

The question of whether or not this reservation was restored to the public domain so that it was open to the location of mining claims was first raised in the case of Collins vs. Bubb, 73 Fed., page 735, and the decision of Judge Hanford in that

case constitutes a most thorough and exhaustive consideration of the question as to the effect of the Act of July 1st, 1892, and holds that by virtue of that act the reservation was restored to the public domain and that a location of a mining claim made thereon was valid.

A great many mining locations were made upon the portion of the reservation which was declared to have been restored to the public domain by the Act of July 1st, 1892, and many of those locations have gone to patent.

In this case it will be seen from the opinion of Judge ———— who heard it in the Circuit Court (Trans. pp. 40-43), that the rule stated in Collins vs. Bubb was thoroughly considered, and re-affirmed, as is also the effect of the Act of Congress of February 20th, 1896, upon which appellees rely.

In 1896, Congress in two special acts extended the mineral land laws so as to apply to the tract of land which was by the Act of July 1st, 1892, declared to be restored to the public domain, and granted a right of way across the tract to a railway corporation. The argument from this is that these enactments were unnecessary, if the act of 1892 did of itself *eo instanti* take the tract out of the reservation and restore it to the public domain; that Congress would not do a vain thing, and that therefore it must be presumed that the act of 1892 as construed by the courts remained ineffective. This is the view that the Circuit Court of Appeals has taken of these acts of 1896, but such is not the necessary inference. The executive branch of the government having denied the rights of prospectors, miners

and railroad builders upon this part of what had been the Colville Reservation, Congress may have very well considered that in itself sufficient reason for additional legislative acts; it certainly does not show a disposition on the part of Congress to acquiesce in the rulings of the interior department, but rather to continue the purpose formerly expressed by it in the Act of 1892, and remove the barriers in the way of mining operations and the construction of highways, which purpose was first formulated by the Act of August 19th, 1890 (26 Stat., 355), which provided for a commission to negotiate with the Colville Indians for a relinquishment of a part of their territory, as plainly expressed in their report to the House of Representatives by its committee on Indian Affairs, which preceded the enactment of the law of 1892, and afterwards made emphatic by these two enactments of 1896. And conceding that the construction of the act of 1892 by the executive officers of the government, is contrary to the opinion of the Circuit Court, that court is not bound to accept the conclusion of the interior department as to the interpretation of the Act of Congress, and Judge Hanford says in the opinion rendered by him (Trans. page 43, folio 86) that he has given careful consideration to the conclusion of the interior department, but that the words of Congress are plain and their meaning is clear, and they must prevail. This upon the authority of

U. S. vs. Tanner, 147 U. S., 661-663.

Merritt vs. Cameron, 137 U. S., 542.

U. S. vs. Graham, 110 U. S., 219.

Swift Co. vs. U. S., 105 U. S., 691.

Hartman vs. Warren, 76 Fed. Rep., 157-162.

The Circuit Court of Appeals concludes that the Act of Congress of February 20th, 1896, was a legislative interpretation of the provisions of the enactment of July 1st, 1892, but we think the construction of the act by Judge Hanford (Trans. page 42, folio 85) is the more reasonable. The very fact that there was an existing controversy as to the meaning of the Act of Congress at the time of the passage of the Act of February 20th, 1896, might have seemed sufficient reason for Congress to settle all controversy by re-affirming existing legislation. In any event the Court is not bound by the legislative interpretation or construction of the statutes. The Court will construe each statute according to established rule of law and precedent. It is no part of the duty of Congress to interpret its own enactments, that duty and right rests entirely with the courts. Congress may pass new laws, but they cannot construe existing ones.

The question is as to the right of a citizen of the United States who is a qualified locator of a mining claim, under the Act of May 10, 1872, to locate and hold a lode claim upon that portion of the old Colville Reservation, in the State of Washington, described in the first paragraph of the Act of July 1, 1892, of the Laws of the Fifty-Second Congress, First Session, page 62.

It appears by the answer and stipulated facts, that in the

month of October, 1895, Charles N. Collins, defendant's grantor, went upon that portion of the old Colville Indian Reservation, which by said Act was declared to be restored to the public domain, and located the Mountain View mining claim thereon. No question is raised as to the sufficiency of his discovery or the making of the locations, and for the purpose of determining the legal proposition herein to be considered, no objection can be raised against the right of the complainant to make such locations and occupy and mine the same, except that by said answer and stipulation it is admitted that said location is upon that portion of the old Colville Indian Reservation described in the first paragraph of said Act of Congress and therein referred to as being restored to the public domain.

The Circuit Court of Appeals failed to distinguish between the original opening of lands to settlement or the location of mining claims or the subjection of the same to the land laws of the United States and a case where the lands had originally been open to such location but temporarily withdrawn. In the case at Bar under the Act of 1866 these lands had been open to location as mining claims a number of years prior to the issuance of the executive order of April, 1872, which withdrew them, and the Act of Congress only restored them to the condition in which they had once existed.

The question then is, did said Act of Congress open that portion of said reservation so that location of mining claims may be made thereon, by a qualified locator?

The section of said Act under which the locator justifies his entry upon the premises in question reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*:

"That subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation in the State of Washington herein provided for, all the following described tract or portion of said Colville Reservation, namely: Beginning at a point on the eastern boundary line of the Colville Indian Reservation, where the township line between townships 34 and 35 north, of range 37 east, of the Willamette meridian, if extended west, would intersect the same, said point being in the middle of the channel of the Columbia river, and running thence west parallel with the forty-ninth parallel of latitude to the western boundary line of the said Colville Indian Reservation in the Okanogan river, thence north following the said western boundary line to the said forty-ninth parallel of latitude, thence east along the said forty-ninth parallel of latitude to the northeast corner of the said Colville Indian Reservation, thence south following the eastern boundary of said reservation to the place of beginning, containing by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian Reservation created by executive order, dated July second, eighteen hundred and seventy-two, be, and is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be open to settlement and entry by the proclamation of the President of the United States and shall

be disposed of under the general laws applicable to the disposition of public lands in the State of Washington."

By the second section of said Act provision is made that the net proceeds arising from the sale and disposal of the lands so opened to entry and settlement shall be set aside in the Treasury of the United States for the future use of the Indians, etc.

By the third section of said Act it is provided that entry of the lands restored shall be made under the homestead law, and the price to be paid by the entryman is fixed.

By the fourth section of this Act it is provided that within six months after the date of the President's proclamation opening the lands vacated to settlement and entry, and after the same have been surveyed, the Indians shall take by allotment, and that those who reside upon the portion vacated may select their allotment thereon. That no restriction as to locality shall be placed upon such selections other than they shall be so located as to conform to the congressional survey or subdivisions.

Said section also provides that where the Indians have made improvements upon the legal subdivisions that they shall be entitled to select and locate the same.

It is provided in said section that the allotment shall be made under the Act of February 28, 1891, and that said allotment shall be subject to the laws of eminent domain in the state of Washington, etc.

By Section 5, Indians residing upon the portion of the reservation vacated and restored shall have the right to select their allotment upon the portion which is not restored.

Section 6 provides for the reservation for the Tonasket school, mills, etc., upon the portion vacated.

Section 7 makes the appropriation to cover the expense of survey and allotment, and Section 8 distinctly disclaims recognition of any title in the Indians to the lands vacated or to any portion of the reserve.

The rights of the appellant depend entirely upon the construction of the Act of Congress of July 1, 1892, above referred to, entitled "An Act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes."

There are a few familiar rules for the interpretation of statutes which have been laid down by the Supreme Court of the United States, which we invoke in this case.

The thing which is within the intention of the makers of a statute is as much within the statutes as if it were within the letter.

U. S. vs. Freeman, 3rd Howard, page 565.

U. S. vs. Babbit, 1st Black, 61.

Gelpcke vs. City of Dubuque, 1st Wall, 221.

Whenever any words of a statute are doubtful or obscure,

the intention of the Legislature is to be resorted to in order to find the meaning of the words.

U. S. vs. Freeman, 3rd Howard, 565.

In this case the Court says, after citing the cases in support of this principle:

"The citations are but different illustrations of the rule that the meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed, the limitation of the rule being that to extend the meaning to any case not included in the words the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason."

The intention of the Legislature when discovered must prevail, any rule of construction declared by previous acts to the contrary notwithstanding.

Cooper vs. Telfair, 4th Dallas, page 14.

Wilkinson vs. Lelande et al., 2nd Peters, 662.

Later the Supreme Court of the United States in Smythe vs. Fiske, 23d Wall, 380, says:

"A thing may be within the letter of a statute, and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

In case of doubt the title of the Act may be looked to in

interpreting its meaning. In the case of Smythe vs. Fiske, 23rd Wall, 380, the Court says:

"Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction. The pre-existing law and the reason and purpose of the new enactment are also considerations of great weight."

This doctrine was first announced by Chief Justice Marshall in the case of the U. S. vs. Fisher, in 2nd Cranch, 385, wherein the Court says:

"It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the Legislature to be extracted from the whole. It is also true that where great inconvenience will result from a particular construction, that construction is to be avoided unless the meaning of the Legislature be plain, in which case it must be obeyed.

"On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself.

"As the enacting clause in this case would plainly give the United States the preference they claim, it is incumbent on those who oppose that preference to show an intent varying from that which the words import. In doing this, the whole act has been critically examined; and it has been contended with great ingenuity, that every part of it demonstrates the

legislative mind to have been directed toward a class of debtors, entirely different from those who become so by drawing or endorsing bills, in the ordinary course of business.

"The first part which has been resorted to is the title.

"On the influence which the title ought to have in construing the enacting clauses, much has been said: and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

Chief Justice Marshall reannounces this doctrine in the case of the United States vs. Palmer, 3rd Wheat., 631.

In the case of the U. S. vs. Union Pacific R. R. Co., in the 91st U. S., page 72, the rule is laid down: That in construing an Act of Congress the Court may recur to the history of the times when it was passed in order to ascertain the reason for, as well as the meaning of, a particular provision in it.

Under these rules of construction we will proceed to consider the act in question, and first the history of the legislation which resulted in the passage of the act under which we maintain that the lands in question are a part of the public domain

of the United States upon which mineral locations may be made under the provisions of the Act of May 10, 1872.

Under the constitution of the United States, Congress has the complete power and control of the public domain. It may delegate the power to create or vacate reservations, or it may exercise it by different enactment. It has frequently delegated the power both to create and to vacate Indian reservations.

In the case of the Sioux Indian Reservation, Congress by Act approved March 2, 1889, entitled an Act to divide a portion of the reservation of the Sioux nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes, took the initiatory step for restoring a portion of the Sioux Reservation to the public domain, but provided that the consent of the Indians should be obtained, and that thereafter a proclamation by the President should be issued.

Congress again by Act, entitled an Act to extend the northern boundary of the State of Nebraska, approved March 28, 1882, provided that the President should in pursuance of said Act declare that the Indian title is extinguished to all lands described in said Act, and in pursuance thereof the President of the United States did by proclamation on the 3rd day of October, 1890, declare the Indian title extinguished and the lands restored to the public domain.

The proceedings for the opening of this portion of the Colville Reservation were initiated by the Act of Congress approved August 19, 1890. (See Laws of First Session Fifty-

First Congress, page 355.) It is therein provided that the President of the United States be authorized to appoint a commission composed of three persons to visit the Colville Indian Reservation and negotiate with said Indians for the cession of such portion of the said reservation as said Indians may be willing to dispose of, that the same may be opened to white settlers. That the said commission be required to report to the Secretary of the Interior and that the Secretary of the Interior be required to report the facts to Congress. In pursuance of this Act of Congress the President did appoint a commmission consisting of three persons to negotiate with the Indians for the cession of such portion of the reservation as the Indians might be willing to dispose of. The commission made its report on June 8, 1891, to the Secretary of the Interior. The report is found in the message of the President of the United States transmitted to Congress on June 9, 1892.

The commission reported (page 9 of said message):

"That of the portion of the territory ceded, it is estimated that about three hundred thousand acres are suitable for agricultural purposes. The remainder is very valuable for grazing purposes and for the timber thereon. Much of the territory ceded is mountainous and abounds in rich mineral deposits. The southern portion of said reservation, it being the portion of said reservation not ceded, contains the largest proportion of agricultural lands, and the grazing lands upon this portion are for the most part fine. The supply of timber here is quite ample. From the best information the commission has been able to obtain, it is believed that there is upon the portion of

said reservation not ceded an acreage of land suitable for agricultural purposes, very largely in excess of a hundred and sixty thousand acres, the the limitation indicated in department instructions dated October 21, 1891. The commission did not deem it advisable to negotiate with the Indians for the purchase of any greater area of territory than that ceded and are satisfied that the portion of said reservation not ceded contains ample territory for the comfort, security, support and maintenance of all the Indians upon said reservation in their various avocations of life. From the best information the commission could obtain without incurring the expense of a survey, and this was not practicable owing to the scarcity of funds, there remains of the portion of the Colville Reservation not ceded near one million three hundred thousand acres."

The commission thereupon made an agreement with the Indians, which is found at page 13 of the President's message, in which they agreed to surrender and relinquish to the United States, all their right, title, claim and interest in and to the northern half of the Colville Reservation. And by Section 12 of said agreement, page 16 of the President's message, it is provided that this agreement shall go into effect from and after its approval by Congress. This agreement was submitted to Congress by the Secretary of the Interior, together with a proposed bill to be enacted ratifying this treaty, which bill is found at page 20 of the President's message. An examination of the bill will show that it was expected by the Secretary of the Interior that Congress would ratify the treaty and recognize the act of the three commissioners whom he had appointed.

And the form of the proposed bill was approved by the acting Attorney General in the letter found at page 29 of the President's message. .

This message was first taken up and acted upon in the House of Representatives and was referred to the committee on Indian affairs, and this committee reported to the First Session of the Fifty-Second Congress, page 2 of the report, that the necessity for opening at least a portion of so large a reservation is apparent, because of the following reasons among others:

A lessening of the dimensions of the Colville Reservation, the planting of active, prosperous and well-ordered white communities on every side of the Indians, the building of railroads, the creation of towns and cities, the opening of mines, and the consequent establishment of markets near at hand, etc.

Further, that the reservation is surrounded on two sides by the Columbia river, on one side by the wilds of British Columbia, and on the other by a portion of Washington, that has no outlet by rail because the reservation itself stands as a barrier to all railroad construction from the East.

The committee stated as a third reason why the reservation may be opened, that the reservation as it stands today is a great obstacle to the development of the State of Washington and the general progress of the Pacific Northwest. So long as it continues to be the sporting ground of so sparse, thriftless and irresponsible a population, its lands will remain untilled and its mines will remain unopened, being more than the In-

dians need for sustenance and comfort, yielding no revenue to the general government, and being of no taxable value to the state of which it is an inseparable and essential part. It cuts off communication between the eastern and western portions of the state and blocks the way to railroads that stand waiting at its boundaries. A railroad company, a local corporation, has constructed a line from the City of Spokane, the metropolis of Eastern Washington, to Marcus, a point on the Columbia river 100 miles distant, at an expense of over two million dollars, and has surveyed an extension through the reservation to the Okanogan country, an extensive region between the Colville Reservation and the Cascade Mountains, rich in minerals and agricultural products, but wholly without railroad transportation, etc.

The committee proceeded to state that they had modified the proposed treaty with reference to the cash payment of money to the Indians.

That at page 5 of the report, the committee proposes an appropriation of $500 for the purpose of procuring the assent of the Indians to the changes and modifications made in the original agreement.

The bill upon which this report was made was entitled "An act to ratify and confirm an agreement with the Indians residing on the Colville Reservation, in the State of Washington, with certain modifications and making appropriations for carrying into effect the same." This was House Bill No. 7557, introduced in the House and referred to the committee of the

whole on April 9, 1892. The report of the House Committee referred to was upon this bill.

The bill went to the Senate with this title and was there completely changed both as to title and character. The title was changed there to read, "An Act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes." Everything in the original Act referring to the treaty entered into by the Commissioners and incorporated in the original bill introduced in the House was abandoned in the Senate. A new Congress had come into office since the passage of the Act providing for the appointment of the commission, and the Senate struck out all reference to the treaty and, disregarding the act of the Commission and the recommendation of the Secretary and the message of the President, enacted as an original proposition that the north half of the Colville Indian Reservation be *vacated and restored to the public domain*, notwithstanding any executive order or other proceeding whereby the same was set apart as the reservation for any Indians or band of Indians, and that the same should be opened to settlement and entry by the proclamation of the President of the United States. The bill went back to the House for concurrence and became a law without the signature of the President.

The decision in this case depends upon the construction to be placed upon the first section of this Act of Congress. It is contended on behalf of defendant in error that by the Act of Congress the lands are fully restored to the public domain to the extent that mining claims may be located thereon under

the Act of May 10, 1872. That the reservations referred to in the first line of said Act are those expressed in the Act and are limited to the reservation for school and other purposes contained in the sixth section of said Act, and a reservation of that class of lands subject to selection and allotment by the Indians who are permitted to make their selection upon that portion of the reservation restored to the public domain where they are residing thereon. It is further contended on behalf of the defendant in error that the proclamation to be issued is the usual one throwing the lands of the appropriate character open to homestead entry and settlement after the same are surveyed.

As hereinbefore shown upon the authority cited, Congress sometimes delegates the power and duty of proclaiming lands restored to the public domain to the President, as in the case of the Sioux Reservation hereinbefore referred to, it requiring the proclamation of the President to restore the lands to the public domain, but in this case Congress has provided only that the proclamation of the President shall affect lands subject to "settlement and entry."

In all instances where Congress refers to the disposal of mineral lands it uses the terms "location and purchase." Where it refers to lands other than mineral lands, Congress uses the terms "settlement and entry," which are the terms applicable to the proceedings to be taken in the U. S. Land Office for acquiring title to public lands. The title to mineral lands is not acquired in or through the U. S. Land Office,

unless parties desire to supplement their title by proceeding to U. S. patent.

The title of a mining claim is absolutely perfected without the aid or interposition of the U. S. Land Office. It is acquired by locating the mining claim upon the ground and recording in the state or territorial local office. Mineral lands are not within the contemplation of Congress, when it provides for the allotment of lands to Indians. The Act of February 28, 1891, second supplement, Revised Statutes of the United States, page 397, under which it is provided by the Act opening this reservation, that the lands shall be allotted specifically designates *agricultural and grazing* lands, as those that may be allotted to the Indians, and in all other instances where the allotment of lands to the Indians is provided for it is limited to *agricultural* and *grazing* lands.

There are minerals not within the scope of the mining act which are found sometimes on such lands, as the Indians may select, such as valuable clays, iron, etc., or valuable minerals might be found on allotted lands after title had passed to the Indians. Thus Congress made the provision in Section 3 of the Act of February 28, 1891, but known mineral lands cannot be selected.

Counsel have laid some stress upon the statement in the Act restoring the Colville Reservation in the fourth section thereof, that:

"No restriction shall be placed upon said selection other

than that they shall be so located as to conform to the congressional survey or subdivisions of said tract of country."

We must construe this phrase in connection with the whole act and with the object and purpose of the legislation which resulted in its passage. It will not be seriously contended that because of the uncertainty of this phrase in the act that the Indians might select and take by allotment mineral lands or lands known to be valuable for the mineral deposits contained therein.

The policy of the general government with reference to its mineral lands has been so long and so clearly established by interpretation of the mineral acts in the Supreme Court of the United States that there is no longer room for controversy.

The title of the Act of 1866, which first provided for the location of mining claims upon the public domain, designates it as an Act to promote and encourage the development of the mineral resources of the United States. The Supreme Court in the case of Steel vs. Smelting Co., 106 U. S., page 449, says: "It is the policy of the country to encourage the development of its mineral resources," and specifically declares this to be the policy of the government both under the Act of 1866 and May 10, 1872, which is the mining act now in force as incorporated into the Revised Statutes of the United States, Section 2319, and following.

It is clearly apparent from the report of the committees having the bill under consideration which resulted in the

legislation opening this portion of the Colville Reservation, that one of the strongest motives moving Congress toward this legislation was the opening of the mineral resources of this section of the country. It is especially referred to in every instance and we are bound to conclude that Congress was acting with a full knowledge of the mineral acts and the interpretation placed upon them in enacting this law. And that it had some distinct and well-defined purpose in changing the character and scope of the legislation originally proposed by the Secretary of the Interior which resulted in the change of the title of the Act itself, and in the complete disregard of the unperfected treaty which had been entered into by the Commission and recommended by the Secretary, and in the complete abandonment of the original proposition contained in the House bill, as it went to the Senate providing for the resubmission of the treaty to the Indians for their ratification, and in substituting for all this a bill declaring in express terms that the part of the reservation in controversy, "Is hereby vacated and restored to the public domain."

Then again in Section 5 of the said Act, Congress in referring to these lands refers to them, "As hereby vacated and restored."

If Congress intended to delay the full restoration of these lands to the public domain until the proclamation of the President should issue for that purpose, why did it depart from the line of action adopted by it in the case of the Sioux Reservation before referred to?

We maintain that by the Act Congress fully restored the north half of the Conville Reservation to the public domain for all purposes, subject only to the allotment of lands to the Indians, and that any rights relative to the location of mining claims or railroads upon the public domain or the performance of any of those acts which may be done upon the unsurveyed public domain of the United States, that this portion of the reservation is now as fully open as though such reservation had never existed.

Mining claims and rights of way for railroads may be acquired upon the unsurveyed public domain of the United States. Homestead entries may not. The class of title that is to be acquired pursuant to the President's proclamation to be issued cannot be acquired upon the unsurveyed public domain and do not come within the same class of consideration as mining claims. In order to open the public domain to homestead entry, it is not only necessary that the lands should be surveyed, but it is also necessary that they should be proclaimed open to settlement.

It was competent for the President to have vacated any portion of this reservation and to have had the same surveyed without the aid of an Act of Congress, and we are bound to conclude the passage of this Act was for the purpose of restoring these lands to the public domain without the aid of the executive order, and that Congress did not do a vain thing in enacting the law, but that it was for the carrying out of the purposes expressed in the report of the committee having charge of the bill that these lands should be restored to the

public domain *quickly*, and without the necessity of an executive order, because of the fact that they contained valuable mineral deposits which are of no use to the Indians, and for the further reason that this portion of the reservation constituted a barrier between the eastern and western portion of the great state through which railroads could not force their way and upon which mineral locations could not be made. Had it not been for the necessities arising out of this condition of affairs so far as it affects mineral lands and the rights of railroad companies, Congress might and doubtless would have allowed the restoration of these lands to the public domain to have awaited the slower process of an executive order issued after the survey of the lands in question. The lands that pass to the Indians by allotment cannot be sold for a period of twenty-five years. The legislation that so provides cannot be said to be in the interest of rapid development of the mineral resources of the United States, and would clearly be against the policy of the government as expressed by Congress and by the Supreme Court that "it is the policy of the country to encourage the development of its mineral resources." It is fair to conclude that Congress had this policy in view when it discarded the slow process of amending the treaty and procuring the consent of the Indians thereto, necessitating a long delay in restoring these lands to the public domain, so that the mineral portions thereof would be available.

The Interior Department, through the Commissioner of the General Land Office, issues at stated intervals official maps prepared within the department by its officers, bearing the ap-

proval of the Commissioner of the General Land Office, which maps are furnished to the United States Land Offices and other officials having charge of the disposal of the public domain, and are intended to direct and control their official acts. Prior to the passage of the Act of 1892 these department maps showed the Colville Indian Reservation as extending to the British Columbia line, and after the passage of that Act these official maps indicated the northern portion of the Colville Indian Reservation as restored to the public domain and as constituting no part of the Colville Indian Reservation. This interpretation of the Act of Congress, emanating from the department having charge of the public lands and Indian reservations, is entitled to consideration in connection with the object and purpose of the Act itself.

Much stress has been laid upon the provision at the end of the first section of the act declaring this reservation restored to the public domain, wherein it is provided that the reservation shall be open to settlement and entry by "proclamation" of the President of the United States. This word "proclamation" does not necessarily mean that there shall be a formal proclamation issued by the President. In the case of Wolsey vs. Chapman, 101 U. S., page 769, the Supreme Court holds that the acts of the heads of departments within the scope of their powers are, within the law, the acts of the President. This doctrine was first enunciated so far as we know in the case of Wilcox vs. Jackson, in the 13th Peters, page 512. This case covers two points urged by us in support of our contention. First, that the same weight is to be attached to the

fact that the department having charge of Indian reservations has indicated by its official maps sent out that the lands upon which defendant in error's locations are made were not within the Indian reservation; and, second, that where a proclamation is authorized or required to create or abolish a reservation, that it does not necessarily follow that a formal proclamation must issue, but that an order or official action upon the part of the heads of the departments acting for him is equivalent to a proclamation. In the case of Wilcox vs. Jackson, the Commissioner of the General Land Office colored and marked upon the map the Ft. Dearborn Reservation, and the Court says of this act: "We consider this, too, as having been done by authority of law, for amongst other provisions in the Act of 1830, all lands are exempted from pre-emption which are reserved from sale by order of the President. Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War department. Hence we consider the act of the War Department in requiring this reservation to be made as being in legal contemplation the act of the President, and consequently that the reservation thus made was in legal effect a reservation made by order of the President within the terms of the Act of Congress."

At the time this decision was rendered, the Indian reser-

vations were under the control of the War Department. They are now under the control of the Interior Department, which has been created since that time.

This doctrine is taken up in the case of Wolsey vs. Chapman, in the 101 U. S., pages 769-70, wherein the Court says:

"A proclamation by the President reserving lands from sale is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained."

In the case at bar, the Interior Department has issued its official map of the United States showing that the lands in question were not within the Colville Indian Reservation. These maps are printed by authority and under Sections 3779-3781 of the Revised Statutes of the United States, at the expense of the government, in the public printing office, and under the provisions of the Act of June 23, 1874, Second Supplement, Revised Statutes, page 42, they are presumably printed by special order of Congress, which act provides, "That no expensive maps or illustrations shall be printed without the authority of Congress."

The Court will take notice of this map as it would of any other public document issued by authority of Congress and of the Executive Department of the government, which needs not to be introduced in evidence to be a part of the evidence of the case. It is a public record, and is equivalent to an order issued out of the Interior Department as the repre-

sentative of the President, as in the case of the Ft. Dearborn Reservation before referred to. It will not be contended that it requires any greater certainty or more precise form of procedure to open a reservation than would be required to create one.

The order creating the Colville Reservation is contained in a few lines as follows:

"Executive Mansion, Washington, April 9, 1872.

"It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as hving been set apart for the Indians therein named by executive order of April 9, 1872, be restored to the public domain and that in lieu thereof the country bounded on the east and south by the Columbia river, on the west by the Okanogan river, and on the north by the British possessions, be, and the same is hereby set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon. U. S. GRANT."

Nothing could be more informal than this. It contains no provisions that the reservations shall be for the exclusive use of the Indians and contains none of the ordinary restrictions that surround the reservations that have been considered in the decisions referred to. Congress by express terms declares it restored to the public domain, notwithstanding this executive order. The Executive Department of the government recognizes the restoration of it and so indicates it upon its official map. This map contains the following legend and certificate:

"DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
HON. SILAS W. LAMOREUX, COMMISSIONER,
UNITED STATES AND TERRITORIES.

"Showing the extent of public surveys, Indian, Military and Forest Reservations. Railroads and Canals and other details.

"Compiled from official surveys of the General Land Office and other authentic sources, under the direction of Harry King, C. D., Chief of Drafting Division. 1895."

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In the case of Noonan vs. Caledonia Min. Co., 121 U. S., page 401, the question of the right to locate a mining claim upon an Indian reservation was squarely before the Supreme Court of the United States, and it was held that while the location of a mining claim cannot be made upon an Indian reservation existing under treaty such as the one had with the Sioux Indians, yet that the acts done by the locator while the reservation yet remained in existence might be taken advantage of by the locator after the passage of the Act of Congress of February 28, 1877. The Court fixes that day as the day after which a mineral location might be made within what had before that time been the Sioux Reservation, and not the day upon which the President should by proclamation declare these lands open to settlement and entry. An examination of the statutes will disclose the fact that the Act providing

for the opening of the Sioux Reservation, including the Black Hills, Dakota, was passed and became a law on the 28th of February, 1877, and yet the proclamation of the President opening the agricultural lands in that portion of the reservation was not issued until long afterward. The Supreme Court treats the date of the Act of Congress as the time when the lands were open to location of mineral claims and not the date of the proclamation of the President.

It will be noticed by reading both the case of Noonon vs. Caledonia Min. Co. and the case of Kendall vs. the San Juan Mining Co., in the 144 U. S., 663, that the Supreme Court bases its decision that the mining claims cannot be located within the reservation expressly upon the ground that "by the terms of the treaty" the tract of country which included the mining property in question was set apart for the absolute and undisturbed use and occupation of the Indians therein named, etc., and that the United States has solemnly agreed that no person except those in the treaty designated and authorized so to do "shall ever be permitted to pass over, settle upon or reside in the territory" described in said article, etc. Both these Indian treaties were made prior to March 3, 1871, at which time Congress enacted the following:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or authorized as an independent nation, tribe, or power with whom the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to

March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

Prior to the passage of the Act of 1871, Congress recognized treaties made with the Indian tribes and nations with a peculiar sanctity, and while refusing in many instances to recognize them as independent nations with whom treaties might be made, Congress invariably construed all questions arising between the whites and Indians in the light of the treaty rights of such Indians. But since the enactment of Section 2079 of the Revised Statutes, Congress has adopted a different method of dealing with the Indians and the Courts will of necessity be compelled to adopt a different rule of construction adapted to the changed condition of the law. No stipulation of "exclusive enjoyment or occupation" is found in the executive order creating the Colville Indian Reservation, but by the language of the executive order the country described is set apart as a reservation for said Indians and for such other Indians as the Department of the Interior may see fit to locate thereon. And in the letter of the Commissioner, found at page 83 of the pamphlet "Executive Orders Relating to Indian Reserves," it is not proposed or recommended that the reservation be set apart for the exclusive use of these Indians.

The Act of July 26, 1866, was passed and in force prior to the creation of this reservation. All these mineral lands claimed by the complainant were open to exploration and purchase by that Act at the time and prior to the making of the

executive order claiming to reserve this land for the limited purpose of the use of the Indians.

This Act declared "that the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs and rules of miners, of the several mining districts so far as the same may not be in conflict with the laws of the United States."

On May 10, 1872, twenty-nine days after the creation of the Colville Reservation, Congress enacted the present mining law, Revised Statutes of the United States, Section 2319, in substantially the same language.

If we are to adopt the reasoning of the Circuit Court of Appeals, we might conclude because Congress without referring to the existing law which authorized the location of mining claims, enacted the law of 1872, that a location made under the law of 1866 would be void, but the fact is that the Act of 1872 merely re-stated the existing law of 1866, so far as declaring the public mineral lands of the United States open to location, whether made under the act of 1866, or 1872, they were alike valid. So we contend that the locations made upon the north half of the Colville Reservation, whether made under the Act of 1892 or 1896, have equal validity.

The Act of Congress, approved March 21, 1866, under which the State of Nevada was created, gave to the state the sixteenth and thirty-sixth sections for school purposes, and in July, 1868,

the State of Nevada issued a patent to William Webehuth for the west half of the southwest quarter of Section 16, in Township 16 north, Range 21 east, lying in Lyon County, according to the official plat of the survey of the public lands made by the United States Surveyor General for the District of Nevada, which patent was recorded in the Recorder's Office of Lyon County on the 25th day of July, 1868, and was issued by the said authorities under and by virtue of the statute conveying the lands assumed to have been granted to the state by the Act of Congress creating the state.

In 1867 a qualified locator of a mining claim located a mining claim upon this same ground, which the state had assumed to convey. This location was made under the mining act approved July 26, 1866; the patent was issued for said mining claim on March 21, 1874. The question was, did the Act of Congress reserve to the use for school purposes to the State of Nevada the sixteenth and thirty-sixth sections of land granted them from the public domain to that extent that a mining location cannot be made thereon?

The Supreme Court of the United States disposes of this question between the claimants in the case of Heydenfeldt vs. Daney Gold Min. Co., in the 93rd U. S., 634, and says that it has been the settled policy of the government to promote the development of the mining resources of the country, and that while Congress was desirous that the people of Nevada in forming a state government should have all of the benefits with reference to the donation of land for educational purposes, yet inasmuch as said lands cannot be taken until surveyed, etc.,

that it would be against the policy of the government, which favors the development of the mineral resources of the country, not to sustain the right to locate a mine within the state until these school sections should be determined, or in the alternative to make the miner take the risk of finding himself and his improvements upon a school section. And the Supreme Court refuses to recognize the rights of the grantee of the State to these mineral lands, basing its decision largely upon the question of the policy of the government with reference to its mineral lands.

Counsel at the argument of this case cited the case of Wilcox vs. Jackson, in the 13th Peters, 498, as defining what are public lands and read therefrom:

"That whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public lands; and that no subsequent law or proclamation, or sale, would be construed to embrace it or to operate upon it, although no other reservation were made of it."

We have no contention with this abstract proposition, but maintain that the Act of Congress opening this reservation, construed under the proper rules, takes this case out of that rule. We might go so far as to take the position that the Act of May 10, 1872, which was prior to the executive order creating this reservation, was a legal appropriation of the mineral lands of the United States for mining purposes and no others, and invoke the rule against counsel that no subsequent law or procla-

mation would be construed as embracing it, yet we do not think we need to invoke this principle.

The case of Leavenworth and Lawrence R. R. Co. vs. the U. S., in the 92nd U. S., 733, relied on by counsel at the argument, applies to agricultural lands, and as we have already endeavored to show, the rule would have no application whatever in a case involving the title to mineral lands, and that under no circumstances could the taking of mineral lands by the proper procedure curtain the right of selection by the Indians under the allotment act because mineral lands are not subject to the allotment act, and the reason given in the Leavenworth case, while it would be applicable to agricultural lands, would have no application whatever to mineral lands.

The case of Walker vs. Henshaw, relied upon by counsel for plaintiffs in error, was also a case in which it was sought to take a class of lands subject to allotment to the Indians and thus curtail their right of selection. The case arose before the passage of the mining acts by Congress and under a condition and policy so entirely different from that which has since that time governed in the determination of these questions that the case can have no application to the case at bar. No allotment can be made, under the Act of Congress opening the Colville Reservation, upon the portion of the reservation restored to the public domain, except to one class of persons, viz.: to Indians who are already located and residing thereon. And even this class of Indians are not permitted to make selections other than those upon which they reside. This provision was undoubtedly

prompted by the suggestion that the Indians had become attached to the localities in which they had been residing for a long time, and upon which they had improvements, that it would be unfair to compel them to leave the portion of the reservation restored to the public domain and make their selection upon that portion not restored. It is not contended that any Indians were located upon or had improvements upon the mineral lands claimed by the complainant. This is a complete answer to the argument of counsel that mineral entries should be suspended until the Indians had first made their selection, for the reasons that said mineral locations might interfere with the selection of the Indians.

The case of the United States vs. Carpenter in the 111 U. S., 347, relied upon by counsel at the argument, was where an attempt had been made to locate agricultural college scrip upon an Indian reservation which had been distinctly withdrawn from settlement by treaty, and is subject to the same criticism as the case last referred to.

The case of Bates vs. Clark, 95 U. S., page 204, relied upon by counsel for the defense at the argument, holds a principle that is against plaintiffs in error. That case decides that as soon as the Indians part with their title the lands cease to be Indian country without any further act of Congress or of the Executive Department of the Government. It will not be claimed that the Indians have any title to the portion of the Colville Reservation upon which defendant in error's mining claims are situated. The act of Congress, in the eighth section, distinctly states that no such title is recognized.

Mr. Justice Miller, in the case of Bates vs. Clark, in determining this question as to what is Indian country, says:

"The simple criterion is, that as to all the lands thus described, it was Indian country whenever the Indian title had not been extinguished; and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

We have but two cases decided by the Supreme Court of the United States in which it has been held that a mining location cannot be made upon an Indian reservation, and those were both cases where, by express provisions of the treaty between the Government and the Indian nation, it was expressly provided that no person should have such rights as would in effect enable them to make a location of a mining claim within the reservation.

We contend, that under the policy of the Government with reference to the development of its mineral resources, taken in connection with the meagre provisions by which the Colville Reservation was created, the utter absence or lack of stipulation for the exclusive possession on the part of the Indians, or prohibition against others than Indians going upon the reservation, all of this in view of the fact that the Department of the Interior has published to the world, through its official map made by authority of Congress, paid for out of the public treasury of the United States and sent out as an announcement of

the survey boundaries of the public lands of the United States, and the Indian reservation thereon, whereupon it appears that the land upon which the appellant's mining locations were made was not within any reservation, and all of this in connection with the act of Congress passed with the view of facilitating the development of mineral resources and railroad enterprises in this particular section of the country, which declared this reservation to be restored to the public domain, the land was subject to mineral location.

The plaintiffs below offered in evidence an official communication in the shape of a public notice, dated January 29, 1892, in which the Secretary of the Interior threatens all persons who shall go upon the portion of the Reservation restored to the public domain by the Act of Congress with certain punishment; to give the interpretation and force to this communication contended for by the defendant would in effect repeal the Act of Congress of May 10, 1872, under which mining claims are located upon the public domain.

We respectfully submit that the Secretary of the Interior has no such power conferred upon him by law and can no more affect the validity of the location of a mining claim made in conformity with and by authority of law, by such an edict, than any other citizen of the United States.

We know of no change in the conditions or laws since the decision of this question in the case of Collins vs. Bubb, which could lead to any different conclusion than was arrived at in that case.

The decision of Judge Hanford in this case, reported in the 87 Federal Reporter, page 154, seems to meet every argument advanced by the appellees, or by the Circuit Court of Appeals, and is a safe and sufficient basis upon which to rest a claim for the reversal of the judgment of the Court below.

Respectfully submitted,

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